Supreme Court, U.S.
FILED
DEC 29 1998
OFFICE OF THE CLERK

No. 98-668

IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

SUSAN LYNN ROBERTS,

Petitioner,

vs.

CHARLES TIMOTHY KLING,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondent, Charles Timothy Kling, prays that this Court deny the Petition for Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on May 20, 1998.

INTRODUCTION

For the purposes of responding to this Petition, Respondent does not challenge the statements of Jurisdiction, Statutory Provisions Involved, or the Basis for Jurisdiction Below made in the Petition for Writ of Certiorari. Respondent does, however, submit a separate Statement of Facts and Proceedings Relevant to the Issues Presented for Review and a Statement of the Reasons Why The Writ Should Not Be Granted.

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

On August 21, 1991, Las Cruces, New Mexico attorney Jerald A. Valentine telephoned the local District Attorney, Douglas Driggers, regarding a case of potential criminal custodial interference. Mr. Valentine told District Attorney Driggers that he represented Ronald Roberts, the father of two minor children over whom Mr. Roberts had primary physical custody. Mr. Roberts and his sons lived in Las Cruces, Dona Ana County, New Mexico. Petitioner Susan Lynn Roberts had rights of visitation, including six weeks of summer visitation.

Mr. Valentine informed the District Attorney that in the summer of 1991, Petitioner requested that Mr. Roberts deliver the children to her in El Paso, Texas so she could take them

with her back to her home in Oregon. El Paso adjoins Las Cruces, and houses the only major airport in the region. Mr. Roberts drove from Las Cruces to El Paso to deliver the children only after agreeing with Petitioner that the children would be returned to him two days before they were to start school in Dona Ana County, New Mexico.

Shortly before school was to start, Petitioner told her ex-husband over the phone that she would not return the children to him as she had agreed and consistent with the court-ordered parenting plan. Mr. Roberts promptly reported that conversation to Mr. Valentine, who contacted Petitioner's attorney. After discussions with Petitioner, her attorney informed Mr. Valentine that the children would be returned to New Mexico on August 21, 1992, and relayed the flight information. Mr. Roberts met the designated flight, however, the children were not on the plane.

Mr. Roberts then contacted an Oregon attorney to obtain a Warrant in Lieu of Writ of Habeas Corpus in Washington County, Oregon. The warrant commanded that the children be taken into custody as they were being illegally held by Petitioner. After attempted service of the warrant on August 21, 1992, the Oregon attorney informed Mr. Roberts that the deputy sheriff was told that Petitioner had left her home and had taken the children to Alaska.

After receiving all of this information from Mr. Valentine, District Attorney Driggers reviewed the essential elements set forth in the New Mexico custodial interference statute, and asked Mr. Valentine additional questions regarding the basis for his belief that a crime had been committed. He then told Mr. Valentine that he would send an investigator, Respondent Timothy Kling, to confirm certain factual allegations presented to him by Mr. Valentine. District Attorney Driggers believed

that if Mr. Kling was able to verify Mr. Valentine's allegations, then probable cause existed to believe that the Petitioner had committed a crime.

Respondent Kling verified the specific information presented to District Attorney Driggers by Mr. Valentine. District Attorney Driggers then made the decision to prosecute the Petitioner. The criminal complaint was drafted and approved by Alfred J. Perez, the Chief Deputy District Attorney and signed by Respondent. The complaint was then taken to a local magistrate, who reviewed the complaint for legal sufficiency and approved the arrest warrant. Respondent then filed the charges at the direction of the district attorney and the chief deputy district attorney.

Petitioner was eventually arrested on November 24, 1992 pursuant to that warrant. At the time of her arrest, she had possession of the two children and had not had additional contact with Mr. Roberts. Petitioner was extradited to New Mexico, and a local judge found probable cause for the charges.

Five months later, in July, 1993, Petitioner's attorney filed a motion to dismiss based on lack of jurisdiction. There, for the first time, Petitioner argued that any actions which she had taken that were the subject matter of the criminal charges were not taken within the state of New Mexico. The district judge granted the motion to dismiss, and the State of New Mexico appealed. The New Mexico Court of Appeals affirmed the dismissal.

Petitioner brought suit against Respondent Kling, alleging violation of her civil rights pursuant to 42 U.S.C. § 1983, in the United States District Court for the District of New Mexico. That court entered summary judgment on behalf of Respondent Kling, finding that Respondent was entitled to both absolute

and qualified immunity from suit under 42 U.S.C. § 1983. Petitioner Roberts appealed to the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit affirmed the ruling of the district court, holding that Respondent was absolutely immune from suit. The Tenth Circuit declined to address whether Respondent was entitled to qualified immunity.

Roberts then petitioned this Court for a Writ of Certiorari. The Court granted certiorari, vacated the judgment and remanded this matter to the Tenth Circuit for reconsideration in light of *Kalina v. Fletcher*, 522 U.S. 118, 118 S. Ct. 502, 139 L. Ed. 2d (1997). On remand, the Tenth Circuit held that Respondent Kling was entitled to absolute immunity for his actions in preparing the criminal complaint against Roberts and in seeking a warrant for her arrest. The Tenth Circuit also addressed whether Respondent was entitled to qualified immunity for his execution of the criminal complaint in which he swore to the truth of the alleged facts. The court affirmed the district court's judgment granting Kling qualified immunity concluding that Roberts had failed to demonstrate that Kling violated a clearly established law.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I.

PURSUANT TO THIS COURT'S RULING IN *KALINA v. FLETCHER*, RESPONDENT KLING IS ENTITLED TO ABSOLUTE IMMUNITY FOR THOSE ACTS HE PERFORMED AS AN ADVOCATE RATHER THAN AS A COMPLAINING WITNESS.

Pursuant to this Court's instruction, the Tenth Circuit re-examined its decision in *Roberts v. Kling*, 104 F.3d 316 (10th

Cir. 1997), in light of the Court's recent ruling in *Kalina v. Fletcher*, 522 U.S. 118, 118 S. Ct. 502, 139 L. Ed. 2d 471 (1997).

In *Kalina*, this Court considered a prosecutor's claim of absolute immunity from liability under 42 U.S.C. § 1983. *Kalina* involved a state prosecutor who commenced a criminal proceeding by filing an information, a motion for arrest warrant and a "Certification for a Determination of Probable Cause" that summarized the evidence supporting the charge. *Id.* at 475-76. The prosecutor personally attested to the truth of the averments in the Certification under penalty of perjury. *Kalina*, 139 L. Ed. 2d. at 476. This Court distinguished between prosecutorial acts taken as an advocate and those taken as a complaining witness. *Id.* at 480-81. The Court held that a prosecutor performing the traditional functions of an advocate is entitled to absolute immunity, while a prosecutor acting as a complaining witness is entitled only to qualified immunity. *Id.* at 474-75. The Court concluded that the prosecutor's activities in connection with the preparation and filing of the information and motion for arrest warrant were protected by absolute immunity because they were clearly a part of the advocate's function. *Id.* at 480. The prosecutor's act of personally attesting to the truth of the facts in the Certification, however, would only be protected by qualified immunity because it was action taken as a complaining witness, rather than as an advocate initiating judicial proceedings. *Id.* at 475.

In its initial ruling in this case, the Tenth Circuit affirmed the judgment of the United States District Court granting Respondent Kling absolute immunity for swearing out a criminal complaint and obtaining an arrest warrant on the grounds that his acts were a functional part of initiating a criminal prosecution. *Pet. App.*, pp. 12-14.

In accordance with the distinction drawn in *Kalina*, the Tenth Circuit affirmed its determination that Kling was absolutely immune for his conduct in preparing the criminal complaint against Roberts and seeking a warrant for her arrest. However, consistent with the Court's holding in *Kalina*, the Tenth Circuit recognized Kling's act of swearing to the truth of the averments in the complaint was a question of qualified immunity.

Petitioner misapprehends the scope of the Tenth Circuit's ruling on remand. The Tenth Circuit assiduously followed this Court's instructions in *Kalina*, by parsing from the scope of absolute immunity those duties reserved to a complaining witness. Those it correctly analyzed under the standard of qualified immunity.

Contrary to Petitioner's allegations, the Tenth Circuit appropriately considered this case on remand in light of *Kalina*, and further review is consequently unnecessary.

II.

SUMMARY JUDGMENT WAS PROPERLY GRANTED IN FAVOR OF KLING BECAUSE HE IS ENTITLED TO QUALIFIED IMMUNITY.

A. Qualified Immunity Standard

Kling is entitled to qualified immunity for his execution and affirmance of the criminal complaint because he did not violate a clearly established law of which a reasonable official in his position at the relevant time would have known. Under the doctrine of qualified immunity, government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate

clearly established rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This Court has consistently held that determining whether a government official is entitled to qualified immunity is a question of law. *Id*; *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). A part of that legal determination requires that a court examine the objective reasonableness of an official's conduct in light of clearly established law. *Id.*

The Tenth Circuit in this case correctly analyzed Kling's defense of qualified immunity by evaluating the factors set out in *Lawmaster v. Ward*, 125 F.3d 1341 (10th Cir. 1997). In *Lawmaster*, the court applied a two-part analysis to evaluate defendant's assertion of qualified immunity. *Lawmaster*, 125 F.3d at 1347. Once a defendant has raised the defense of qualified immunity, the plaintiff bears the burden of presenting sufficient facts to show: 1) that the defendant's conduct violated the law; and 2) that the law was clearly established when the alleged constitutional violations occurred. *Id.* In order for a plaintiff to defeat a defense of qualified immunity, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640. If a plaintiff fails to make such a showing, then the defendant is entitled to qualified immunity.

B. The Tenth Circuit Properly Applied the Qualified Immunity Standard to Kling's Conduct

Petitioner contends that Kling is not protected by qualified immunity because Kling made misrepresentations or material omissions as to information he supplied in swearing out the criminal complaint against Petitioner. Aplt. App. at 4, 32. The crux of Petitioner's argument is that Kling made a false jurisdictional statement at the beginning of the criminal complaint when he stated that two crimes had occurred "On or

about the 17th day of August, 1992, in the County of Dona Ana, State of New Mexico." *Id.* at 9. Petitioner asserts that Kling knew she was not in New Mexico on August 17, 1992 and committed no crimes in the state on that date. *Id.* at 9. The Tenth Circuit affirmed the trial court's finding that the statement about which Petitioner complains was jurisdictional and not factual, and that the facts averred in support of the criminal complaint clearly disclosed that Petitioner was not in New Mexico on or about the 17th day of August 1992 and that Kling had not misrepresented her whereabouts.[1]

It is admittedly established law that a police officer who makes a false statement knowingly and intentionally, or with reckless disregard for the truth in an affidavit for a warrant violates the Fourth Amendment right to be free from unreasonable searches and seizures. *Franks v. Delaware*, 438 U.S. 154 (1978); *Salmon v. Schwarz*, 948 F.2d 1131 (10th Cir. 1991). In light of this clearly established law, the Tenth Circuit correctly analyzed whether Petitioner had presented sufficient facts to demonstrate that Kling had violated a clearly established law of which a reasonable official in his position would have

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1. Roberts also asserts that Kling knowingly made a false statement as to the date the children were to be returned to New Mexico. Aplt. App. at 9. The trial court rejected this argument holding that it was undisputed that Kling

> did not make a material factual omission or misrepresentation in failing to specifically point out in his statement of facts that there was a disagreement as to the date the children were to be returned to New Mexico. First, that information could be inferred from the statement of facts. Second, the dispute was, and continues to be, irrelevant to the determination of whether probable cause existed that the offense in question had been committed.

Aplt. App. at 37. The Tenth Circuit concurred.

known. The Tenth Circuit determined that Petitioner failed to allege facts showing that Kling intentionally executed the criminal complaint knowing that there was no jurisdictional basis in New Mexico for the crimes charged. Aplt. App. at 6.

Petitioner argues that the Tenth Circuit's ruling was improper because the question of whether a reasonable official could have believed his conduct to be lawful is a fact question for the jury. Aplt. App. 11. This Court has explicitly recognized that whether an official's conduct is reasonable in light of clearly established law is part of the analysis in determining whether a defendant is entitled to qualified immunity. *Harlow*, 457 U.S. at 818-819. In *Anderson v. Creighton*, 483 U.S. 635, 641, 643 (1987), this Court specifically held that a determination of whether an arrest or search was objectively legally reasonable "will often require examination of the facts possessed by the arresting or searching officials." It is also well established precedent in the Tenth Circuit that resolution of qualified immunity requires factual inquiry to determine whether an official's conduct violated clearly established law. *See Lawmaster*, 125 F.3d at 1349 (the court recognized that determining whether an official's conduct is reasonable is a "highly fact-dependent inquiry" requiring consideration of the totality of the circumstances); *Salmon v. Schwarz*, 948 F.2d 1131, 1136 (10th Cir. 1991) (trial court engaged in factual inquiry to determine whether an official's conduct was objectively reasonable entitling him to qualified immunity); *Pueblo Neighborhood Health Ctrs. v. Losavio*, 847 F.2d 642, 648 (10th Cir. 1988) (court holding that *Harlow* does not preclude evaluation of governmental actor's intent when it is an element of the plaintiff's substantive claim)

In determining whether Kling was entitled to qualified immunity, the Tenth Circuit specifically acknowledged its burden to evaluate "the totality of the circumstances to

determine as a matter of law, whether the plaintiff has stated sufficient facts to show the defendant violated her constitutional rights." Pet. App. at 6. The Tenth Circuit affirmed the trial court's finding that based on all the facts presented to the magistrate in support of probable cause, Kling acted as a reasonably competent officer in seeking a warrant for Petitioner' arrest. Pet. App. at 6, 36-37. Specifically, the trial court found that

> no material information was withheld by Kling from the magistrate and that given the technical nature of the jurisdictional inquiry, Kling acted reasonably in executing the criminal complaint.

Pet. App. at 36-37.

Respondent seeks to have the Court move from its established jurisprudence by denying qualified immunity whenever there is a disputed issue of fact. Pet. at 12. A factual determination of the objective reasonableness of an officer's conduct is a well settled area of inquiry inherent in every qualified immunity analysis. Petitioner's analysis would eviscerate the qualified immunity doctrine as it has consistently been analyzed and applied by this Court.

Protection of the qualified immunity afforded government officials is essential in order to preserve the exercise of official discretion. It is the protection for "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs* 475 U.S. 335, 341 (1986). Here, after careful analysis of all of the facts, the Tenth Circuit determined, in an exercise of its discretion, qualified immunity to be appropriate.

The Tenth Circuit's analysis of qualified immunity in this case is appropriate and consistent with law. The Tenth Circuit

examined the totality of Respondent Kling's conduct in light of clearly established law and properly determined that Kling's conduct was objectively reasonable and that he did not violate Petitioner's constitutional rights.

The qualified immunity standard is deeply embedded in this Court's jurisprudence and in the conduct of official behavior. Petitioner's attempt to reformulate the qualified immunity doctrine would effectively sound its death knell. Here, the Tenth Circuit carefully and correctly analyzed both facts and law to reach a decision well within its discretion. Its grant of qualified immunity to Respondent should not be disturbed.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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